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In The
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case involves the interpretation of the Constitution and laws of the United States as they pertain to the State of Louisiana's sovereign right to provide for the election of its members to the United States Congress, and the extent, if any, to which Congress, in enacting 2 U.S.C. §§ 1 and 7, limited the authority of the states to provide for the manner of electing members to Congress. The specific question presented is whether the election system employed by the State of Louisiana to elect its members to the United States Congress conflicts with federal laws governing the time for holding congressional elections so as to render Louisiana's manner of conducting its congressional elections unenforceable under the Supremacy Clause; or whether the decision of the United States Court of Appeals for the Fifth Circuit constitutes an unnecessary and unwarranted abrogation of the authority specifically granted to the states by Article I, Section 4, Clause 1 of the United States Constitution to provide for the manner of electing members to Congress.

LIST OF PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: Murphy J. Foster, Jr., in his official capacity as Governor of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, who were the defendants in the district court and appellees in the Court of Appeals.

Respondents: G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, who were the plaintiffs in the district court and the appellants in the Court of Appeals.

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◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

OPINIONS BELOW

Petitioners seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit filed on July 30, 1996 in *G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois v. Michael J. Foster, Jr., Governor of State of Louisiana, and Fox McKeithen, Secretary of State of Louisiana*, reported at 90 F.3d 1026 (U.S. App. 5th Cir. 1996) and reprinted at Appendix A to this petition, p. App.1.

The opinion of the United States District Court for the Middle District of Louisiana in *G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois v. Edwin W. Edwards,*

Governor of State of Louisiana, and Fox McKeithen, Secretary of State of Louisiana, No. 95-788, April 11, 1996, is unreported and reprinted at Appendix B to this petition, p. App. 24. The Judgment of the District Court is reprinted at Appendix C to this petition, p. App. 25.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was entered on July 30, 1996 (Appendix A, p. App. 1). Under the Rules of this Honorable Court, this Petition For Writ of Certiorari is timely filed within 90 days after the entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article I, Section 4, Clause 1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

United States Constitution, Article V, Clause 2:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

> thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

2 U.S.C. Section 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. Section 7:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Louisiana Revised Statutes 18:1272:

> § 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and

at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

Louisiana Revised Statutes 18:401:

§ 401. Purpose and nature of primary and general elections A. Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statutes 18:402 (Appendix D, p. App. 26)

Louisiana Revised Statutes 18:511 (Appendix D, p. App. 33)

STATEMENT OF THE CASE

This case involves a challenge to Louisiana's "open elections system" used for electing Louisiana's members to the United States Congress. In August 1995, the respondents, four citizens of Louisiana instituted this lawsuit against the Governor and the Secretary of State of Louisiana, to challenge the elections system that has been in place in Louisiana for nearly two decades, asserting that it conflicts with 2 U.S.C. §§ 1 and 7. Jurisdiction in the United States District Court for the Middle District of Louisiana was based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4).

In 1975, the Louisiana Legislature enacted Act 1 of the 1975 Regular Session, instituting Louisiana's "open elections system". By its terms, Act 1 became effective on July 1, 1975 and received the necessary preclearance from the United States Justice Department pursuant to 42 U.S.C. §1973c. The provisions of Act 1 were subsequently incorporated into the Louisiana Election Code, R.S. 18:1 et seq., by Act 697 of 1976. That act also received U.S. Justice Department preclearance. The open elections system was first employed in elections for state offices in 1976, and in the Congressional elections held in 1978. Since that time, the State of Louisiana has conducted all elections held to elect persons to Congress and to all the elective offices in this State, except the office of presidential elector, in accordance with the open elections system.

Louisiana's open elections system provides for electing United States Senators and Representatives as follows: (a) candidate qualifying is held prior to the primary election, in which all candidates regardless of party, or lack thereof, file qualification papers so as to be placed on the ballot for the primary election, R.S. 18:461; (b) if more than one candidate qualifies for a particular seat, a primary election is held on the first Saturday in October next preceding the date of the general election, in which all candidates for that congressional seat are placed on the ballot, regardless of party affiliation, or lack thereof, R.S. 18:1272; and (c) the general election is held on the first Tuesday next following the first Monday in November, in which the two top vote-getters in the primary election, regardless of party affiliation, or lack thereof, are placed on the ballot, unless the top vote-getter in the primary received a majority of the votes in the primary election, R.S. 18:1272. Louisiana's Election Code further provides that a candidate is deemed elected if he is the lone candidate to file qualification papers for

a particular seat, or if he receives a majority of the votes cast in the primary election, R.S. 18:511.

In 1872, Congress enacted legislation, 2 U.S.C. §§ 1 and 7, which provided the time for conducting elections for congress as the first Monday in November of the election year. The legislative history of the federal statutes indicates that the purpose of the federal legislation was to prevent political manipulation of the election process and to limit the number of elections held.

Respondents, G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois initiated this lawsuit challenging the validity of the Louisiana open elections system as applied to Congressional elections. They asserted that Louisiana's elections system conflicts with the provisions of 2 U.S.C. §§ 1 and 7 because in some instances, when a candidate for congress receives a majority of the votes in the primary election, no general election for that seat is held on the first Monday in November.

All parties in the litigation filed Motions for Summary Judgment, which were heard before the District Court on October 23, 1995. On April 11, 1996, the District Court denied the respondents' Motion for Summary Judgment and granted the petitioners' Motion for Summary Judgment, finding that there were no genuine issues of material fact and that the petitioners were entitled to judgment as a matter of law. The District Court stated: "The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States." Appendix B, p. App. 24.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. On July 30, 1996, a panel of the Fifth Circuit, by a 2-1 vote, reversed the decision of the District Court. The majority held that "plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." The court deferred instituting a remedy, but instead afforded the Louisiana Legislature an opportunity, until the end of the next regular legislative session in April of 1997, to enact a remedy in accordance with its decision. The matter was remanded to the District Court to reconsider plaintiffs' request for injunctive relief in the event the State does not impliment a remedy within a reasonable time after the 1997 legislative session.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the writ of certiorari sought herein to review the judgment and opinion of the appellate court because this case presents an important question of federal constitutional and statutory law decided by the appellate court that has not been, and should be settled by this Honorable Court. More specifically, the Court should grant this writ to clarify the extent to which, if any, 2 U.S.C. §§ 1 and 7 limit the authority of the states to determine the manner in which they conduct congressional elections.

ARGUMENT

The decision of the Fifth Circuit Court of Appeals misinterpreted the federal laws pertaining to congressional elections so as to find a conflict with Louisiana's elections system, and declared that "the Louisiana system as applied to federal elections must yield under the Supremacy Clause." The Su-

premacy Clause, Article V, Clause 2 of the United States Constitution, reads:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Supremacy Clause expresses a basic precept of our system of government, that the federal constitution and all laws enacted pursuant thereto override conflicting laws enacted by the states pursuant to the states' own constitutions. The matter at hand, however, does not involve simply an instance in which a state, pursuant to its constitution, enacts laws regulating the same area as that regulated by the federal government. Rather, this case involves a state exercising the authority specifically given to it by the United States Constitution, and the question of whether the state's ability to exercise that authority is limited by certain federal legislation enacted by Congress pursuant to its constitutional authority to do so.

The United States Constitution, Article I, Section 4, Clause 1 authorizes each state to prescribe the times, places and manner of holding elections for senators and representatives, subject to specific regulations enacted by Congress. " The states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299, 311, 61 S.Ct. 1031, 1035, 85 L.Ed. 1368 (1941). *See also, Krasnoff v. Hardy*, 436 F.Supp. 304 (E.D. LA, 1977). Thus, the issue is not whether federal law trumps state law, but rather whether Congress, in exercising its specific constitutional authority to regulate the

time for holding congressional elections, intended thereby also to limit the states' authority, as granted by the federal constitution, to regulate the manner of conducting its congressional elections.

The State of Louisiana, in accordance with Article I, Section 4, Clause 1, enacted its open elections system as its manner for electing its members to Congress. That system eliminated the use of multiple party primaries and subsequent general elections, and instead established a system that requires only one primary and one general election in order to elect members to Congress. In so doing, Louisiana tied its elections system to the federal laws regulating the time for holding congressional elections.

Congress enacted 2 U.S.C. §§1 and 7 pertinent to the time for holding congressional elections.

2 U.S.C. § 1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the congress commencing on the 3d day of January next thereafter.

In compliance with 2 U.S.C. §§ 1 and 7, Louisiana enacted LSA-R.S. 18:1272:

> "§ 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner one United States senator shall be elected in the year 1978, and every six years thereafter.

These federal and state statutes, when read together, give a clear indication that the State of Louisiana enacted its laws regulating the manner of conducting congressional elections so as to act in concert with the federal laws regulating the times for holding the elections. The federal statutes provide for elections on the first Tuesday following the first Monday in November. Louisiana's law mirrors the federal law, providing that the general election for Congress be conducted on the first Tuesday following the first Monday in November. The laws do not conflict; they coincide.

The appellate court decision erroneously interpreted the federal law so as to create a conflict between the federal and state legislation, by interpreting the federal legislation as requiring that the state hold contested elections on the first Tuesday following the first Monday in November. The dissenting opinion of Judge Dennis correctly and succinctly demonstrates the fallacies of the decision:

> In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.
>
> The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. *But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day.* The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections

> and the lack of any semblance of uniformity. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Appendix A, pp. App. 17-19, (citations omitted)(emphasis added).

Unlike party primaries in other states, Louisiana does not nominate candidates by parties, but instead the top two vote getters, regardless of party, can qualify for the general election. The general election is then held at the time specified by federal law, unless only one candidate qualifies for the election, either because he was the only candidate to file qualifying papers for that seat, or because he received more than 50% of the vote in the primary election. The appellate court's decision would nevertheless require that the state hold a contested election, even when only one candidate qualifies for the general election.

The appellate court's interpretation of 2 U.S.C. §§ 1 and 7 as requiring the state to hold a contested election on the date designated by the federal legislation would under its logic, require the state to recruit an additional candidate to run for a particular seat whenever only one person files qualifiying papers, and would also prevent the state from holding absentee balloting prior to the designated election date.

The appellate court decision unnecessarily intrudes on the

sovereignty of the State of Louisiana to elect its representatives and senators to Congress, by needlessly and erroneously finding a conflict between the federal and state laws, when none exists. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of (state) sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961). *Goldstein v. California*, 412 U.S. 546, 554-555, 93 S.Ct. 2303, 2309, 37 L.Ed.2d 163 (1973). Each sovereign possesses equal regulatory power as the federal government, subject only to the independent operation of the Supremacy Clause.

Given the importance of the state's right to exercise discretion in the formulation of a system of electing its representatives and senators to Congress, *United States v. Classic*, 313 U.S. 299 (1941), the appellate court's decision invalidating Louisiana's open elections system as it pertains to congressional elections constitutes a serious invasion into the sovereignty of the State of Louisiana. Review by this Court of the appellate court decision is necessary to prevent such an affront upon the right of the states to determine how to conduct their congressional elections, particularly as here, where the state and federal laws at issue can reasonably be interpreted as acting in concert, rather than in conflict.

Louisiana is entitled to exercise its sovereign power to establish the manner of electing its representatives and senators for Congress. The Constitution vests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns ..." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399 (1932); *See also, Roudebush v. Hartke*, 405

U.S. 15, 24-25, 92 S.Ct. 804, 810 (1972), and *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974).

The legislative history does not substantiate that Congress, by enacting 2 U.S.C. §§1 and 7, intended to fashion the result the appellate court decision imposes. Clearly there is no indication that Louisiana's elections system is contrary to the purposes stated by the federal legislation's proponents, i.e., prevention of manipulation of the election process by the political parties and the elimination of multiple federal elections. In fact, the concerns addressed by the members of congress in 1872 obviously arose from the party primary system in use at that time by most, if not all of the states. Louisiana's system is clearly less offensive to these articulated congressional goals then are the election systems employed by many states today, where multiple party elections are held in varying months before the general elections, and in which voters in some states may venture to the polls three, and possibly four, times to cast their ballots in congressional elections.

The appellate court's finding of a conflict between the federal statutes and Louisiana's election laws that track the very language of the federal statutes and further the purposes for which the federal statutes were enacted, requires review by this Honorable Court.

CONCLUSION

According to the United States Constitution, the manner by which a state elects its members to Congress is for the state to determine, unless and until Congress provides otherwise. The sovereign powers of the states are thereby implicated whenever a challenge is mounted to the manner proscribed by the states for holding congressional elections. The appellate court decision in this matter erroneously interpreted the federal statutory provisions pertinent to congressional elections so as to unnecessarily limit the states' authority to provide for

the manner in which states conduct their congressional elections. If sustained, the appellate court decision will greatly impact the State of Louisiana's election process and will prohibit the state from exercising its sovereign powers to determine on its own, through its own governmental processes, the method of electing its representatives to the United States Congress. This Honorable Court should grant the writ petitioned for herein and take this case on review so as to correct the erroneous decision of the appellate court and settle the important federal question of the extent, if any, the federal legislation at issue limits the authority of the states to decide the manner in which they conduct their congressional elections.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

(Filed July 30, 1996)

G. SCOTT LOVE, PAUL S. BERGERON,
KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Respondents,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF STATE OF LOUISIANA, and FOX MCKEITHEN, Secretary of State of Louisiana,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

Before DAVIS and DENNIS, Circuit Judges, and FALLON*, District Judge.

DAVIS, Circuit Judge:

Respondents, four Louisiana voters, appeal from the district court's order granting defendants' motion for summary judgment and dismissing plaintiffs' suit seeking declaratory and injunctive relief on grounds that Louisiana's method of conducting congressional elections violates the Constitution and laws of the United States. We reverse.

*District Judge of the Eastern District of Louisiana, sitting by designation.

I.

In August 1995 four Louisiana citizens, who are registered to vote in Louisiana and who have a history of voting in congressional elections, filed this action for declaratory and injunctive relief. They seek this relief under 42 U.S.C. s 1983 and pursuant to our federal question jurisdiction to resolve a Constitutional claim. Their core allegation is that the Louisiana open primary system violates the federal statutes that establish a uniform federal election day for members of Congress and must yield under the Supremacy Clause of the Constitution. After crossmotions for summary judgment were filed, the district court granted summary judgment for the defendants. The respondents filed a timely appeal.

II.

We review a district court's grant of summary judgment de novo. *Mozeke v. International Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). In deciding this appeal, we address only the pre-emption claim. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

In *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), the Supreme Court summarized the theories under which state laws are pre-empted as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id. at 368-69, 106 S.Ct. at 1898-99 (internal citations omitted).

We start our pre-emption analysis from the bedrock premise that Congress has authority to enact the requirements for federal elections. Article I, Section 4, Clause 1 of the Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

In *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), the Court, interpreting Art. I, § 4, Cl. 1, stated that "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration,...." Id. at 366, 52 S.Ct. at 399.

In 1872, Congress established a uniform election day for elections for U.S. Representatives by enacting 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for

the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

This same election day was later adopted for elections for U.S. Senators in 2 U.S.C. § 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

Congress also set this day for the election of presidential electors. 3 U.S.C. § 1. [1]

Congress in 2 U.S.C. §§ 1, 7 therefore declared that all elections for Congress should be held on the same date, the Tuesday following the first Monday in November (federal election day). This declaration was subject to only two exceptions: (1) in states that required a majority vote for election, a runoff could be held between federal election day and January when officials take office; and (2) an election could be held on a different date if a vacancy occurred in the office. 2 U.S.C. § 8. [2] In

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[1] 3 U.S.C.§1 states:
The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

[2] 2 U.S.C. § 8 states:
The time for holding elections in any State, District, or Territory

adopting this scheme, Congress precluded a state from holding an election in which members of Congress could be elected before the federal election date.

This interpretation is supported by the legislative history. This history indicates that Congress wanted a uniform election day to prevent earlier elections in some states unduly influencing the later voters, to prevent fraudulent voting in multiple state elections, and to remove the burden of voting in more than one federal election in a given year. Cong.Globe, 42d Cong., 2d Sess. 112 (1871). [3]

The legislative history of 2 U.S.C. § 8 also supports the conclusion that Congress intended any outcome determinative election to be held on federal election day unless it fell within

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for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

[3] Mr. Butler who introduced the amendment stated the following reasons:

> But on account of the facility for colonization and repeating among the large central States, New York holding its election in November, and Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. I think it will be fair for everybody that on the day when one votes all should vote, and that the whole question should be decided then. Again, there is another and a different question. Every fourth year many of the States have

the exception in § 8. During the consideration of § 8, Senator Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect*. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a vacancy, and *still more seldom that there is a failure to elect*. In all those States in which a plurality elects, no such thing as failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot. . . .

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to hold two elections: one for the State on one day, and one for the electors of President and Vice President on another day. This throws a great burden needlessly and uselessly, it seems to me, upon the people, and I move this for the purpose of having a uniform election to take place in the future at a time when all the State constitutions as to State elections may be conformed to it.

Cong.Globe, 42d Cong., 2d Sess. 112 (1871).

On a different day, Mr. Butler reintroduced this amendment and stated:

> Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some States undue advantage. It gives some parties undue advantage.... But what I contend is that is an undue advantage, that it is a wrong, and it is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work, to say nothing of the expenses which fall on the politicians, and are of no very great consequence one way or the other.

Cong.Globe, 42d Cong., 2d Sess. 141 (1871).

> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number.* Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

Cong.Globe, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

For all of the above reasons, we conclude that Congress intended that all determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8.

We turn next to the Louisiana election scheme which respondents contend conflicts with 2 U.S.C. §§1, 7. Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes. The pre-1978 Louisiana law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. *See* La.Rev.Stat. s 18:546 (now repealed).

In 1978, Louisiana drastically changed its method for selecting federal and state officials by adopting an open primary system. Under this system, all candidates, regardless of party

affiliation, appear on the same ballot and all voters regardless of party affiliation may vote for the candidate of their choice. La.Rev.Stat. § 18:401(B). [4]

This open primary is ordinarily [5] held "on the first Saturday in October next preceding the date of the general election." La.Rev.Stat. § 18:1272(A). [6] *See also* La.Rev.Stat. § 18:1272(B). To win in the October primary, a candidate must receive a majority of the votes cast. Louisiana holds its general election on the federal election day. *Id.* But the names of congressional candidates (like candidates for statewide office) only appear on the general election ballot if no single candidate receives a majority of the votes in the primary and a runoff between the two top candidates is required. La.Rev.Stat. § 18:1271. [7]

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[4] La.R.S. s 18:401(B) states:
B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

[5] The primary is scheduled for September 21 this year because October 5 is a religious holiday.

[6] La.R.S. § 18:1272(A) states:
A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

[7] La.R.S. § 18:1271 states:
Except as otherwise provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

Thus the Louisiana open primary system allows contested elections for Congress to be decided in the primary, which is held at least one month before the general election. This is the portion of the Louisiana election scheme that respondents contend is in conflict with 2 U.S.C. §§ 1, 7. The Louisiana election code provides that: "A candidate who receives a majority of the votes cast for an office in a primary election is elected." La.Rev.Stat. § 18:511(A). When the seat in Congress is filled in the October primary, no candidate's name appears on the ballot in the November general election and no vote for that office can be cast on the federal election date. In fact, since 1978 over 80% of the contested congressional elections have been decided in the October primary. Only nine of fifty-seven contested elections for U.S. Representatives and one of six contested elections for U.S. Senator had candidates placed on the general election ballot for November.

Respondents argue that the 2 U.S.C. §§ 1, 7 sets the earliest day that a state may hold a contested election for Congress where the winner may be determined. Respondents contend that the Louisiana election system conflicts with this provision by allowing such an election at an earlier date.

Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a] candidate who receives a majority of the votes cast for an office in a primary election *is elected*." La.R.S. § 18:511(A) (emphasis added).

We agree with respondents that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters. Thus, the Louisiana system as applied to federal elections must yield under the Supremacy Clause.

III.

[4] Having decided that the Louisiana open primary election scheme conflicts with 2 U.S.C. §§ 1, 7, we now turn to a consideration of the appropriate remedy.

Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law. See *Frost v. Corporation Common*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). This drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago.

In exercising our discretion in granting or withholding an injunction we balance "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944).

Courts should be particularly loathe to preempt a state legislative task such as establishing an election scheme. Even in reapportionment cases where the voters' Fourteenth Amendment rights to equal protection is infringed, federal courts frequently give the state an opportunity to remedy the defect before fashioning a judicial remedy. *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir.1991);

Mississippi State Chapter, Operation Push, Inc., v. Mabus, 932 F.2d 400 (5th Cir.1991).

In addition to this federalism concern, a number of additional factors weigh against the issuance of an injunction: (1) The campaign for statewide and federal offices for the September 21 open primary election is well underway. Qualification date for candidates for those offices closed on Friday, July 12, 1996. Enjoining that election would be expensive for the candidates and the State. Ordering another election at a different time would also be confusing to the voters. (2) By contrast, the injury to the plaintiffs will be relatively minimal. To be assured of participating in the election of their representatives and senators, plaintiffs must vote on September 21. But they have the right to vote in those elections on that date and if they do so, their vote will count. If plaintiffs' representatives and senators are elected on September 21, they will be required to return to the polls on November 5 to vote in the presidential election. However, compared with the cost of enjoining the September 21 election, two trips to the polls is a relatively minor cost.

CONCLUSION

For the reasons discussed above, we conclude that plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. ss 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day. The next scheduled session of the Louisiana legislature is in May 1997. We remand this case to the district court with directions to reconsider plaintiffs' request for injunctive relief if the state has not acted to resolve the conflict within a reasonable time after the 1997 legislative

session. We also remand all remaining issues in this case to the district court. [8]

REVERSED and RENDERED.

DENNIS, Circuit Judge, dissenting:

Article I, Section 4, Clause 1 of the United States Constitution establishes the power and the duty of each state legislature to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to the power of the Congress to "at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Thus, except to the extent that Congress acts to change or supplement state laws, the States retain broad authority to regulate elections under the Times, Places and Manner Clause. It cannot be doubted that the Clause invests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[ ]." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795 (1932).

> This view is confirmed by the second clause of article 1, § 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single

[8] We decide this case under our federal question jurisdiction to resolve a claim under the Supremacy Clause. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983). The issues not considered in this opinion include whether plaintiffs have stated a claim for a violation of the Privileges and Immunities Clause of the Fourteenth Amendment and whether plaintiffs have stated a claim enforceable under 42 U.S.C. § 1983.

> exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It "has a general supervisory power over the whole subject." [Citations omitted.] But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making "such regulations"; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.

Id. at 366-367, 52 S.Ct. at 399. *See also, Roudebush v. Hartke*, 405 U.S. 15, 24-25, 92 S.Ct. 804, 810-11, 31 L.Ed.2d 1 (1972); ("Unless Congress Acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections."); *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) ("[ ] Art I, § 4, cl 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' "); *United States v. Classic*, 313 U.S. 299, 311, 61 S.Ct. 1031, 1035-36, 85 L.Ed. 1368 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.")

Congress, in deference and respect to the states, has been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution. See, "The Ku-Klux Cases." *Ex Parte Yarbrough et al.*, 110 U.S. 651, 660-662, 4 S.Ct. 152, 156- 58, 28 L.Ed. 274

(1884). It was not until 1842 that Congress took any action under the Times, Places and Manner Clause by providing that each member of Congress should be elected by a separate district, composed of contiguous territory. 5 St. 491. *Id.* Thirty years afterwards, in an act to apportion representatives to Congress among the several states according to the ninth census, Congress provided for the first time a regulation for the time of holding elections of representatives. The Act of Feb. 2, 1872, ch. 11. §§ 3 and 4, 17 Stat 28, 29, in pertinent parts, provides:

> Sec. 3. That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is hereby fixed and established as the day for the election, in each of said States and territories, of Representatives and delegates to the Congress commencing on the fourth day of March next thereafter.
>
> Sec. 4. That if, upon trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day here by fixed and established for such election, or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, an election shall be held to fill any vacancy caused by such failure, resignation, death, or otherwise, at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur.

In substance, the same provisions have been continued in the present federal statutes regulating the time of holding elections for Representatives. 2 U.S.C. § 7 provides that the Tuesday next after the first Monday in November, in every even numbered year, is established as the day for the election in each of the states and territories. 2 U.S.C. § 8 provides that the time for holding elections for Representative to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several states and territories respectively.

The Louisiana laws prescribing the times, places and manner of holding elections for Senators and Representatives provide for "open" primary and general elections. All qualified voters may vote for candidates in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it. La.R.S. 18:401(B). The times for the elections are fixed as follows: (a) The primary election is held on the first Saturday in October next preceding the date of the general election, La.R.S. 18:1272(A); and (b) the general election is held on the Tuesday next after the first Monday in November in every even numbered year, i.e., on the federal election day. La.R.S. 18:1272(B). The Louisiana laws also provide that a candidate who receives a majority of the votes cast in the primary election "is elected." La.R.S. 18:511(A).

The plaintiffs contend that the Louisiana election laws are unconstitutional because they (a) allow a possibility that a candidate for Representative will be elected by receiving a majority of votes in the primary election; (b) and are thus contrary

to the federal statute which requires that a Representative be elected on the federal election day, which Louisiana designates as the general election day.

The Supremacy Clause, Art. V, cl. 2 of the United States Constitution, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The United States Supreme Court has developed a doctrine of preemption for deciding when a state law or constitution, in whole or in part, is "contrary" to the United States Constitution, or a valid federal law or treaty, made in pursuance thereof, that requires the state provision to yield to the federal. The principal precepts comprising this doctrine were summarized recently by the court in *Northwest Central Pipeline Corporation v. State Corporation, Commission of Kansas*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989):

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law

> at issue conflicts with federal law, either because it is impossible to comply with both, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

Applying the preemption precepts to the Louisiana laws prescribing the times, places and manner of electing Representatives, it is clear that, under the supremacy clause, the state's laws are not contrary to the federal statutes that partially regulate the same subjects. Obviously there is no explicit statutory language signaling an intent to pre-empt, and we cannot infer an intention to occupy the entire field of election regulation because Congress has not legislated comprehensively on the subject. The plaintiffs present no argument to this effect but contend that the state law at issue conflicts with the federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the pre-

vious judicial understanding of the those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day. The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. See majority opinion p. 5, n. 3, and p. 6. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal elec-

tion day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day. [1] The plaintiffs have not supplied any statistics by which we may compare the open primary to the party primary and other systems. However, during the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence the party primary system probably resulted proportionately in even fewer actual contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Supreme Court observed:

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[1] For much of the history of the electoral party primary, Louisiana, like the rest of the South, was a one-party state in which general elections meant little. Paul Grosser, "Political Parties." LOUISIANA POLITICS; FESTIVAL IN A LABYRINTH 257 (1982). See also, *United States v. Classic*, 313 U.S. 299, 314 n. 2, 61 S.Ct. 1031, 1037 n. 2, 85 L.Ed. 1368 (1941). "Since the end of Reconstruction, the Republican party in Louisiana had served as little more than a nominal element in state politics. The domination of the Democratic party was so pervasive that victory in a Democratic primary invariably meant election." Bennett Wall, LOUISIANA: A HISTORY 2nd Ed. 362 (1990). The Republicans only fielded candidates on an "episodic" basis, and did not elect a member of Congress (after Reconstruction) until 1972. Grosser, *supra* at 257-8. During all of those decades in which many states held general elections which were often uncontested and usually mere formalities, Congress never chose to act to require the de facto determinative election to be held on federal election day.

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under s 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.

* * *

[T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

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[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives (1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. . . .

Id. at 311, 313-314, 318-319, 61 S.Ct. at 1035-36, 1036-37, 1039.

Nevertheless, the plaintiffs concede that "[p]rior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Respondents' Brief at p. 32. Accordingly, they argue that this court should strike down the open primary law as it applies to Congressional elections and "revive Louisiana's pre-1978 election system for Congressional elections to the extent practicable because the pre-1978 election system is 'the only valid expression of the legislative intent.' Frost, 278 U.S. at 526-27, 49 S.Ct. at 239." *Id.* This concession and Congress's refusal during the past century to abolish or alter state party primary regulations casts grave doubt on Respondents' argument that it was Congress's intent by the Federal Election Day laws to insure that contested Congressional elections, or the opportunity to qualify for them, take place in every district on each federal election day. Because it is upon this erroneous interpretation of the Federal Election Day laws that respondents rely to show that the state's open election laws are contrary thereto and that it is impossible to comply with both, their argument in this respect is without merit.

Respondents and the majority find significance also in the fact that La.R.S. 18:511(A) provides that "[a] candidate who re-

ceives a majority of the votes cast for an office in a primary election is elected." Because the Federal Election Day laws do not necessarily preclude a candidate from being declared elected after receiving a majority of the votes in the open primary, I do not believe this provision is contrary to the federal law. However, if the majority concludes that this provision alone prevents the open elections laws from passing Supremacy Clause muster, it would be a simple matter for this court to enjoin such a declaration that a congressional candidate is elected until the federal election day, rather than declaring the whole law unconstitutional in its application to Congressional elections.

Nor is the state's open elections law contrary to the Federal Election Day laws because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. 2 U.S.C. § 7 was enacted, the Supreme Court has observed, "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough*, 110 U.S. 651, 661, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884). But those evils unduly benefiting certain states and political parties and unnecessarily burdening voters and politicians, Cong.Globe, 42nd Cong., 2d Sess. 141 (1871) (remarks of Senator Butler), are not perpetuated by the current state open elections laws any more, if at all, than by the previous party primary laws that respondents wish us to revive. As noted above, the legislative history indicates that the evil perceived by Congress at that time was the unbridled power of the states to independently arrange their election dates in a haphazard and pernicious manner completely untethered to a federally prescribed national election day. Although the present law does impose the burden of double elections on employed voters, so did the old party primary law

and so does virtually every other election system. The passage of time, however, "has mitigated those burdens to the extent that "the poor laboring man" no longer "loses his day's work" by going to the polls." *Id. See Busbee v. Smith*, 549 F.Supp. 494, 524 (D.D.C.1982). Improvements of registration and election laws have greatly reduced the danger of a voter crossing state lines to vote in more than one Congressional district election. The advent of polling coupled with the instantaneity of modern media coverage has largely superceded whatever effects the outcome of a congressional primary in one state may have on an election in another.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

G. SCOTT LOVE;
PAUL S. BERGERON;
KATHLEEN B. BALHOFF; AND
BENNIE BAKER-BOURGEOIS

VERSUS

EDWIN W. EDWARDS,
GOVERNOR OF LOUISIANA; AND
FOX MCKEITHEN, SECRETARY
OF STATE OF LOUISIANA

CIVIL ACTION

NUMBER 95-788

(Filed April 11, 1996)

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

Therefore:

IT IS ORDERED that the defendants' motion for summary judgment be and it is hereby **GRANTED.**

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment be and it is hereby DENIED.

Judgment shall be entered dismissing the plaintiffs' suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

s/ Frank J. Polozola

FRANK J. POLOZOLA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

G. SCOTT LOVE;
PAUL S. BERGERON;
KATHLEEN B. BALHOFF; and
BENNIE BAKER-BOURGEOIS

CIVIL ACTION

versus

NUMBER 95-788-B

EDWIN W. EDWARDS,
GOVERNOR OF LOUISIANA; and
FOX MCKEITHEN, SECRETARY
OF STATE OF LOUISIANA

(Filed April 11, 1996)

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiffs dismissing this suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

s/ Frank J. Polozola

FRANK J. POLOZOLA
United States District Judge

APPENDIX D

Louisiana Revised Statutes 18:402:

§ 402. Dates of primary and general elections

A. Gubernatorial elections. Elections for governor and officers elected at the same time as the governor shall be held every four years, beginning in 1983.

(1) Gubernatorial primary elections shall be held on the second to last Saturday in October of an election year.

(2) Gubernatorial general elections shall be held on the fourth Saturday after the second to last Saturday in October of an election year.

B. Congressional elections. Elections for members of Congress and officers elected at the same time as members of Congress shall be held every two years, beginning in 1982.

(1) Congressional primary elections shall be held on the first Saturday in October of an election year.

(2) Congressional general elections shall be held on the first Tuesday after the first Monday in November of an election year.

C. Municipal and ward elections. In all municipalities with a population of less than four hundred seventy-five thousand, elections for municipal and ward officers who are not elected at the same time as the governor or members of congress shall be held every four years.

(1) Primary elections for municipal and ward officers who are not elected at the same time as the governor or members of congress shall be held on the first Saturday in April of an election year, or on the second Tuesday in March of an election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year.

(2) General elections for municipal and ward officers who are not elected at the same time as the governor or members of Congress shall be held on the fourth Saturday after the first Saturday in April of an election year unless the primary election for such officers is held on the second Tuesday in March; in such case the general election shall be held on the third Saturday in April of an election year.

D. Parochial and municipal elections in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time. Elections for parochial and municipal officers in such a parish containing a municipality with a population of four hundred seventy-five thousand or more shall be held every four years, beginning in 1986.

(1) Primary elections for parochial and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time shall be held on the first Saturday in February of an election year.

(2) General elections for parochial and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time shall be held on the fourth Saturday after the first Saturday in February of an election year.

E. Special elections to fill newly created office or vacancy in office. An election to fill a newly created office or a vacancy in an existing office, except the office of state legislator or representative in congress, shall be held on the dates fixed by the appropriate authority in the proclamation ordering a special election as follows:

(1) A special primary election shall be held on the first of the following days that is not less than twelve weeks after the date on which the proclamation calling the special primary election was issued; however, no special primary election shall be held at the same time as a gubernatorial election if the date of the gubernatorial election is less than fourteen weeks after the date on which the proclamation was issued and, in such case, the special primary election shall be held on the first of the following days after that gubernatorial election:

(a) The second to last Saturday in October, when the special general election is held on the fourth Saturday after the second to last Saturday in October.

(b) The first Saturday in October, when the special general election is held on the first Tuesday after the first Monday in November.

(c) The first Saturday in April, when the special general election is held on the fourth Saturday after the first Saturday in April or on the second Tuesday in March during the presidential election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year; however, commencing in 1986 and every fourth year thereafter, this date shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(d) The third Saturday in October, when the special general election is held on the fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(e)(i) The first Saturday in February of an election year for parish and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(ii) The first Saturday in February of 1995, except in parishes and municipalities where an election on bonds, taxes, and other propositions or questions has been called and held in January of 1995. Notwithstanding the provisions contained in R.S. 18:467 and 468, the qualifying period for primary elections held on the first Saturday in February of 1995 shall open on the third Monday in December of 1994 and shall close at 5:00 p.m. on the Wednesday following the third Monday in December of 1994.

(2) A special general election shall be held on one of the following days:

(a) The fourth Saturday after the second to last Saturday in October of 1983 and every fourth year thereafter.

(b) The first Tuesday after the first Monday in November of even-numbered years.

(c) The fourth Saturday after the first Saturday in April of any year unless the primary election is held on the second Tuesday in March; in such case the general election shall be held on the third Saturday in April; however commencing in 1986 and every fourth year thereafter, this date shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(d) The fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(e)(i) The fourth Saturday after the first Saturday in February in a parish containing a municipality with a population of four hundred seventy-five thousand or more, when the special primary election in such parish and municipality is held on the first Saturday in February of an election year for parish and municipal officers.

(ii) The fourth Saturday after the first Saturday in February

of 1995, when the special primary election is held as authorized in R.S. 18:402(E)(1)(e)(ii) on the first Saturday in February of 1995.

(3) The secretary of state shall not include the name of any candidate on any ballot for a special election to fill a vacancy in any office to which this Subsection is applicable unless such special election has been called in accordance with the provisions of this Subsection and scheduled on one of the dates provided herein. Any elector who is eligible to vote in any such special election may apply for injunctive relief to prohibit the placing of the name of any candidate in an improperly called election on the ballot. Venue for such application shall be in any parish in which the election is called, and the secretary of state shall be the proper party defendant.

F. Bond, tax, or other elections. Every bond, tax, or other election at which a proposition or question is to be submitted to the voters shall be held only on one of the following dates:

(1) The second to last Saturday in October or the fourth Saturday after the second to last Saturday in October of 1983 and every fourth year thereafter.

(2) The first Saturday in October or the first Tuesday after the first Monday in November of even-numbered years.

(3) The first Saturday in April or the fourth Saturday after the first Saturday in April of any year or on the second Tuesday in March or third Saturday in April during the presidential election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year; however, commencing in 1994 and every fourth year thereafter, the first Saturday in April shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(4) The third Saturday in October or the fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(5) The third Saturday in January of any year, the third Saturday in July of any year which dates, in addition to the other dates provided for in this Subsection, shall be exclusively for elections on bonds, taxes, and other propositions or questions and for no other kind of election; however, commencing in 1994 and every fourth year thereafter, the third Saturday in January shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(6) For a parish containing a municipality with a population of four hundred seventy-five thousand or more, the first Saturday in February or the fourth Saturday after the first Saturday in February in 1986 and every fourth year thereafter.

(7) In case of an emergency, upon application to and approval by the State Bond Commission by two-thirds vote of its total membership, and with approval of the governor, the governing authority of a parish, of a municipality, or of a parish or city school board may conduct a bond or tax election on a Saturday which is not provided for in this Subsection.

G. Prohibited days. No election of any kind shall be held in this state on any of the days of Rosh Hashanah, Yom Kippur, Sukkoth, Shmini Atzereth, Simchas Torah, the first two days and the last two days of Passover, Shavuoth, Fast of AV, or the three days preceding Easter. If the date of any election falls on any of the above named days, the election shall be held on the same weekday of the preceding week.

Louisiana Revised Statutes 18:511:

§511. Election of candidates in a primary election

A. Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election is elected. If there are two or more offices of the same character to be filled, the number of votes necessary to constitute a majority shall be greater than the result obtained by dividing the total votes cast for all of the candidates by the number of offices to be filled and dividing the result so obtained by two. If more candidates receive a majority than there are offices to be filled, those of such candidates receiving the highest total of votes shall be elected, to the number required to fill all of the offices. Any votes received by a withdrawn candidate or a deceased candidate shall be void and shall not be counted for any purpose whatsoever.

B. Election of unopposed candidates for public office. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

C. Election of unopposed candidates for membership on party committees. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for membership on a political party committee does not exceed the number of members to be elected to the committee, the candidates for membership on that political party committee, or those remaining after the death or withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

D. Effect of a tie vote. If, as a result of a tie vote in a primary election, the number of candidates who would be elected to an office exceeds the number of persons to be elected to the office, the candidates who received the same majority of the votes cast in the primary election are not elected, but they are qualified as candidates in the general election.